

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

RICHARD ALLEN ROXBERRY,  
*Petitioner.*

No. 2 CA-CR 2013-0294-PR  
Filed November 13, 2013

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See* Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24

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Petition for Review from the Superior Court in Gila County  
No. S0400CR201200016  
The Honorable Peter J. Cahill, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Bradley D. Beauchamp, Gila County Attorney  
By June Ava Florescue, Deputy County Attorney, Globe

*Counsel for Respondent*

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Emily Danies, Tucson

*Counsel for Petitioner*

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**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

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V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Richard Roxberry seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Roxberry has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Roxberry was convicted of possession of dangerous drugs, specifically methamphetamine. The trial court imposed a maximum, three-year prison sentence. It ordered Roxberry to serve the sentence consecutive to a sentence imposed in a separate cause. Roxberry thereafter initiated a proceeding for post-conviction relief, arguing in his petition that trial counsel was ineffective in failing to more strenuously argue against what he claims is an excessive sentence. After an evidentiary hearing, the trial court denied relief, concluding trial counsel had not been ineffective.

¶3 On review, Roxberry repeats his arguments made below and contends the trial court abused its discretion in concluding counsel had not been ineffective. Our review of the court's factual findings "is limited to a determination of whether those findings are clearly erroneous"; we "view the facts in the light most favorable to sustaining the lower court's ruling, and we must resolve all reasonable inferences against the defendant." *State v.*

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*Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). When “the trial court’s ruling is based on substantial evidence, this court will affirm.” *Id.*

¶4 To establish a claim of ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). There is “[a] strong presumption” that counsel “provided effective assistance,” *State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005), which the defendant must overcome by providing evidence that counsel’s conduct did not comport with prevailing professional norms, *see State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶5 Roxberry had the burden of proving his allegations by a preponderance of the evidence. *See* Ariz. R. Crim. P. 32.8(c). But Roxberry did not present any affidavits or other evidence to support his claim that counsel’s performance was deficient. Rather, at the evidentiary hearing, Rule 32 counsel merely argued that trial counsel should have objected more strenuously or made arguments additional to or slightly different from those actually raised by trial counsel in support of probation or a lesser sentence. “Proof of ineffectiveness must be a demonstrable reality rather than a matter of speculation.” *State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984). On the record before us, we cannot say the trial court abused its discretion in determining Roxberry had failed to meet his burden to establish counsel’s performance fell below prevailing professional norms. Therefore, although we grant the petition for review, we deny relief.